PUNJAB NATIONAL BANK v. MALAYAN BANKING BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
BADARIAH SAHAMID JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-501-03-2015]
16 FEBRUARY 2017

CIVIL PROCEDURE: *Jurisdiction – Forum conveniens – Proper forum to try action – Claim to recover payment and reimbursement from bank in India – Whether High Court of Kuala Lumpur had jurisdiction to try action – Whether proceedings already commenced in India – Whether principal parties located in India – Whether letter of credit which was subject matter of dispute issued from bank's office in India – Whether forum conveniens was High Court in India*

CIVIL PROCEDURE: *Setting aside – Appeal for – Application to set aside writ and statement of claim, notice of writ to be served out of jurisdiction and order of service out of jurisdiction – Jurisdiction – Forum conveniens – Proper forum to try action – Claim to recover payment and reimbursement from bank in India – Whether High Court of Kuala Lumpur had jurisdiction to try action – Whether forum conveniens High Court in India – Whether appeal ought to be allowed*

The respondent ('plaintiff') was a licensed bank incorporated in Malaysia while the appellant ('defendant') was a bank incorporated in India. At the request of the defendant, the plaintiff agreed to act as the advising bank in a letter of credit transaction ('LC transaction'). The defendant acted as the issuing bank in the LC transaction. Sara International Ltd India was the applicant in the LC transaction and the beneficiary of the LC transaction was Sims Copper Sdn Bhd. Pursuant to the terms of the LC, the defendant irrevocably undertook to pay and reimburse the plaintiff for any payment made by the plaintiff to the beneficiary under the LC, upon negotiation of the documents presented by the beneficiary. Communications between the plaintiff and the defendant were conducted through the messaging communication service provided by the Society for Worldwide Interbank Financial Telecommunication, commonly known as SWIFT messages. At the request of the applicant, a LC was issued by the defendant in favour of the beneficiary. The beneficiary was required to present documents stipulated in the LC ('the documents') to the plaintiff in order to claim payment. Subsequently, the beneficiary presented the documents to the plaintiff and the plaintiff was satisfied that the documents constituted a complying presentation, and accordingly negotiated the LC and made a total payment of USD1,983,765.65 to the beneficiary. The LC documents were duly delivered to the defendant and the plaintiff thus sought payment and

reimbursement of the said amount from the defendant. Subsequently, the plaintiff received a SWIFT message from the defendant alleging that there were discrepancies in the LC documents presented. The defendant refused to make payment to the plaintiff due to the aforesaid purported discrepancies. Hence, the plaintiff commenced the action in the High Court to recover payment and reimbursement from the defendant under the LC transaction. The High Court Judge granted leave to the plaintiff to serve writ, statement of claim and notice of writ to the defendant out of jurisdiction, which were duly served on the defendant. The defendant applied by encl. 12 to set aside the plaintiff's writ and statement of claim, notice of writ to be served out of jurisdiction and order of service out of jurisdiction on the defendant in New Delhi. The High Court Judge, in dismissing the defendant's application, determined that the High Court of Kuala Lumpur had jurisdiction to try the action. Hence, this appeal. The issues that arose were (i) the issue of jurisdiction to try the action; and (ii) the issue of *forum conveniens.*

Held (allowing appeal with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) Proceedings had already commenced in India. The principal parties in the action were located in India. The applicant of the LC was located in India and the applicant had requested the defendant, a bank in India, to open a letter of credit. The defendant had no presence in Malaysia and had never submitted itself to the jurisdiction of the Malaysian court. The letter of credit which was the subject matter of the dispute was issued from the defendant's office in India. The discrepancies in the documents as well as the rejection of the documents were made by the defendant and the applicant, both located in India. The defendant's obligation to reimburse the plaintiff for payment made to the beneficiary arose from the terms of the letter of credit which was opened by the defendant in India. Witnesses as well as documentary evidence in respect of the letter of credit would be located in India. The proper law of the letter of credit was that with which it had the 'closest and most real connection.' Premised on all the facts and circumstances of the case, the *forum conveniens* was the High Court in Delhi, India. (paras 31-37)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') adalah sebuah bank berlesen diperbadankan di Malaysia manakala perayu ('defendan') adalah sebuah bank diperbadankan di India. Atas permintaan defendan, plaintif bersetuju untuk bertindak sebagai bank penasihat dalam satu transaksi surat kredit ('transaksi SK'). Defendan bertindak sebagai bank pengeluar dalam transaksi SK. Sara International Ltd India adalah pemohon dalam transaksi SK dan benefisiari transaksi SK adalah Sims Copper Sdn Bhd. Menurut terma-terma SK, defendan secara muktamad bersetuju membayar dan membayar balik plaintif

untuk apa-apa bayaran yang dibuat oleh plaintif kepada benefisiari di bawah SK, atas rundingan dokumen-dokumen yang dibentangkan oleh benefisiari. Komunikasi antara plaintif dan defendan dijalankan melalui perkhidmatan komunikasi pesanan yang disediakan oleh Society for Worldwide Interbank Financial Telecommunication, yang lebih dikenali sebagai pesanan SWIFT. Atas permintaan pemohon, satu SK telah dikeluarkan oleh defendan memihak kepada benefisiari. Benefisiari diminta membentangkan dokumen-dokumen ditetapkan dalam SK ('dokumen-dokumen') kepada plaintif untuk menuntut bayaran. Seterusnya, benefisiari membentangkan dokumen-dokumen kepada plaintif dan plaintif berpuas hati bahawa dokumen-dokumen tersebut mematuhi apa yang diminta, dan sewajarnya merundingkan SK dan membuat bayaran penuh USD1,983,765.65 kepada benefisiari. Dokumen-dokumen SK diserahkan kepada defendan dan plaintif menuntut bayaran jumlah tersebut dari defendan. Kemudiannya, plaintif menerima pesanan SWIFT daripada defendan yang mendakwa bahawa terdapat percanggahan dalam dokumen-dokumen SK yang dikemukakan. Defendan enggan membuat bayaran kepada plaintif akibat percanggahan-percanggahan yang didakwanya. Oleh itu, plaintif memulakan tindakan di Mahkamah Tinggi untuk memperolehi bayaran dari defendan di bawah transaksi SK. Hakim Mahkamah Tinggi memberikan kebenaran kepada plaintif untuk menyerahkan writ, pernyataan tuntutan dan notis writ kepada defendan di luar bidang kuasa, yang telah diserahkan dengan sempurna kepada defendan. Defendan memohon melalui lampiran 12 untuk mengetepikan writ dan pernyataan tuntuan plaintif, notis writ yang diserahkan di luar bidang kuasa dan perintah penyerahan di luar bidang kuasa ke atas defendan di New Delhi. Hakim Mahkamah Tinggi, dalam menolak permohonan defendan, memutuskan bahawa Mahkamah Tinggi Kuala Lumpur mempunyai bidang kuasa untuk membicarakan guaman ini. Oleh itu, rayuan ini. Isu-isu yang berbangkit adalah (i) isu bidang kuasa untuk membicarakan guaman; dan (ii) isu *forum conveniens.*

Diputuskan (membenarkan rayuan dengan kos)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Prosiding telah dimulakan di India. Pihak-pihak utama dalam guaman itu berada di India. Pemohon SK berada di India dan pemohon telah meminta defendan, satu bank di India, untuk membuka surat kredit. Defendan tidak mempunyai kehadiran di Malaysia dan tidak pernah menyerahkan dirinya kepada bidang kuasa mahkamah Malaysia. Surat kredit iaitu hal perkara yang dipertikaikan dikeluarkan oleh pejabat defendan di India. Percanggahan yang terdapat dalam dokumen-dokumen serta penolakan dokumen-dokumen dibuat oleh defendan dan pemohon, yang kedua-duanya berada di India. Tanggungjawab defendan untuk membayar balik plaintif untuk bayaran yang dibuat olehnya

kepada benefisiari berbangkit daripada syarat-syarat surat kredit yang dibuka oleh defendan di India. Saksi-saksi serta keterangan dokumentar berkenaan surat kredit berada di India. Undang-undang sepatutnya bagi surat kredit adalah dengan mana ia mempunyai 'the closest and most real connection'. Berlandaskan semua fakta dan hal keadaan kes itu, *forum conveniens* adalah Mahkamah Tinggi di Delhi, India.

Case(s) referred to:
American Express Bank Ltd v. Mohamad Toufic Al-Ozier & Anor [1995] 1 CLJ 273 SC ***(refd)***
Offshore International SA v. Banco Central SA & Another [1976] 3 All ER 749 ***(refd)***
Power Curber International Ltd v. National Bank of Kuwait SAK [1981] 3 All ER 607 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 11 r. 1

For the appellant - T Gunaseelan; M/s Brijnandan Singh Bhar & Co
For the respondent - Mong Chung Seng & Chia Oh Sheng; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see Malayan Banking Bhd v. Punjab National Bank [2015] 1 LNS 512 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] Parties will be referred to as they were in proceedings before the High Court.

[2] This is an appeal against the decision of the High Court dated 5 March 2015, dismissing the defendant's application in encl. 12, to set aside the plaintiff's writ and statement of claim dated 28 January 2014, notice of writ to be served out of jurisdiction dated 24 January 2014 and order of service out of jurisdiction on the defendant in New Delhi, India, dated 6 March 2014.

Background Facts

[3] A summary of the background facts below is derived from the learned High Court Judge's grounds of judgment with suitable modifications.

[4] The plaintiff is a licensed bank incorporated in Malaysia. The defendant is a bank incorporated in India.

[5] On 18 November 2011, at the request of the defendant, the plaintiff agreed to act as the advising bank in a letter of credit transaction. ("the LC transaction"). The defendant acted as the issuing bank in the LC transaction.

[6] Sara International Ltd India is the applicant in the LC transaction. The beneficiary of the LC transaction is Sims Copper Sdn Bhd, Malaysia.

[7] It was not disputed that the letter of credit ("LC") was irrevocable and it is governed by the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP 600"). The UCP 600 governs the operation of letters of credit transactions worldwide, but does not contain any governing law or jurisdiction clauses.

[8] Pursuant to the terms of the LC, the defendant irrevocably undertook to pay and reimburse the plaintiff for any payment made by the plaintiff to the beneficiary under the LC, upon negotiation of the documents presented by the beneficiary.

[9] Communications between the plaintiff and the defendant were conducted through the messaging communication service provided by the Society for Worldwide Interbank Financial Telecommunication, commonly known as SWIFT messages.

[10] At the request of the applicant, an LC was issued by the defendant in favour of the beneficiary. The defendant accordingly advised the beneficiary of the opening of the LC and the terms thereof.

[11] The beneficiary was required to present documents stipulated in the LC ("the documents") to the plaintiff in order to claim payment.

[12] On 25 November 2011, the beneficiary presented the documents to the plaintiff in ten separate presentations and requested the plaintiff to negotiate the LC transaction.

[13] The plaintiff was satisfied that the documents presented by the beneficiary constituted a complying presentation, and accordingly negotiated the LC and made a total payment of USD1,983,765.65 to the beneficiary.

[14] On 1 December 2011, the plaintiff forwarded the LC documents to the defendant by courier. The LC documents were duly delivered to the defendant on 3 December 2011. The plaintiff also sought payment and reimbursement of USD1,983,765.65 from the defendant pursuant to the undertaking given by the defendant to the plaintiff under the LC transaction.

[15] On 5 December 2011, the plaintiff received a SWIFT message dated 1 December 2011 from the defendant advising amendments to the LC. The amendment requested was for an additional document of Certificate of Analysis, Weight and Quality ("certificate") to be presented by the beneficiary under the LC transaction.

[16] On 20 December 2011, the plaintiff received a SWIFT message dated 20 December 2011 from the defendant alleging that there were discrepancies in the LC documents presented, and refusing to make payment to the plaintiff on the LC transaction.

[17] The plaintiff received a SWIFT message dated 21 December 2011 from Wells Fargo Bank, New York ("Wells Fargo") informing the plaintiff that the defendant is refusing payment due to the aforesaid purported discrepancies. (Wells Fargo was appointed by the plaintiff as the plaintiff's agent for the sole purpose of tracing and receiving payment under the LC from the defendant, as the payment was to be made in USD).

[18] Despite several demands by the plaintiff, the defendant has refused to make payment or reimbursement to the plaintiff.

[19] Hence on 28 January 2014, the plaintiff commenced the action in the High Court, Kuala Lumpur to recover payment and reimbursement from the defendant under the LC transaction.

[20] By an order dated 6 March 2014, the learned High Court Judge granted leave to the plaintiff to serve writ, statement of claim and notice of writ to the defendant out of jurisdiction. The writ, statement of claim and notice of writ were duly served on the defendant on 11 April 2014. The defendant entered appearance on 23 May 2014.

[21] On 26 June 2014, the defendant applied by encl. 12, to set aside the plaintiff's writ and statement of claim dated 28 January 2014, notice of writ to be served out of jurisdiction dated 24 January 2014 and order of service out of jurisdiction on the defendant in New Delhi, India dated 6 March 2014.

Issues Before The High Court

[22] The principal issue before the High Court was whether the High Court has jurisdiction to try the action?

Decision Of High Court

[23] The learned High Court Judge determined that the High Court of Kuala Lumpur has jurisdiction to try the action. In her grounds of judgment, she states as follows:

> The civil jurisdiction of the High Court in Malaya, as well as that of the High Court in Sabah and Sarawak, is set out in s. 23(1) of the Courts of Judicature Act 1964, which provides as follows:
>
> > (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where-
> >
> > (a) The cause of action arose; or
> >
> > (b) The defendant or one of several defendants resides or has his place of business; or
> >
> > (c) The facts on which the proceedings are based exist or are alleged to have occurred; or

(d) Any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[24] The learned High Court Judge held that although the defendant had not submitted to the jurisdiction of the Malaysian court, the Malaysian court can assume jurisdiction statutorily under O. 11 r. 1 of the Rules of Court as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. Reference was made to the Supreme Court case of *American Express Bank Ltd. v. Mohamad Toufic Al-Ozier & Anor* [1995] 1 CLJ 273 as authority.

[25] In addition, the learned High Court Judge made a finding that in the instant case, the cause of action arose in Malaysia and thus, the High Court in Malaya has jurisdiction to try the action. In para. 36 of her grounds of judgment, she states as follows:

> Based on the Affidavits, the LC was made within the jurisdiction of Malaysia. The payment under the LC was received by the Beneficiary in Malaysia upon presentation of Documents in Malaysia. It is this court's considered view that the cause of action arose in Malaysia as the place where the payment to the Beneficiary was made. The Defendant was required by the LC to perform its obligation to reimburse the Plaintiff upon the presentation the documents by the Beneficiary in Malaysia. Since the cause of action arose in Malaysia, the High Court in Malaya has jurisdiction to try the action.

Grounds Of Appeal

[26] The main grounds of appeal stated in the memorandum of appeal are as follows.

(i) The learned judge erred in law and in fact in finding that the cause of action arose when the payment was made by the respondent/plaintiff to the beneficiary Sims Copper Ltd. When in fact the cause of action only arose when the documents were returned to the appellant/defendant pursuant to the letter of credit.

(ii) The learned judge erred in law and in fact in holding that the cause of action arose in Malaysia.

(iii) The learned judge erred in law and in fact in holding that the said letter of credit was issued by the appellant/defendant in Kuala Lumpur when in fact it was issued by the appellant/defendant in New Delhi, India.

(iv) The learned judge erred in law and in fact in holding that the appellant/defendant's responsibility to repay the respondent/plaintiff was in Malaysia, when in fact the payment if at all, has to be paid in accordance with the said letter of credit in India.

(v) The learned judge erred in law and in fact in failing to hold that the *forum conveniens* was in India.

A **Our Judgment**

[27] After careful consideration of the oral and written submissions of learned counsel, the appeal records and relevant authorities, we allowed the appeal with costs and set aside the decision of the learned High Court Judge. The grounds of our decision are set out below.

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[28] In our considered opinion, there are two issues that merit consideration. First, is the issue of jurisdiction to try the action. Second, is the issue of *forum conveniens*.

[29] Learned counsel for the defendant submitted that proceedings in C respect of the LC transaction between the parties have already commenced in Delhi, India between Sara International Ltd and Malayan Banking Bhd. Our attention was drawn to two orders issued by the High Court of Delhi, India. The first order dated 16 July 2014 (refer to core bundle p. 28). The second order dated 14 August 2014 (refer to core bundle p. 36). It would D appear that parties have submitted to the jurisdiction of the Indian courts.

[30] We note, as pointed out by learned counsel for the defendant, that the orders are to be enforced in India and this issue was not addressed by the learned High Court Judge in her grounds of judgment.

E **[31]** While we are of the considered opinion that both the High Court in Kuala Lumpur and the High Court in Delhi, India have jurisdiction to try the present action. However, on the particular facts, the *forum conveniens* is the High Court in India for the following reasons.

[32] To start with, proceedings have already commenced in India. We F agree with the submissions of learned defendant's counsel that the principal parties in the action are located in India. The applicant of the LC, Sara International Ltd is located in India. The applicant had requested the defendant, Punjab National Bank (Delhi) in India to open a letter of credit. The defendant had no presence in Malaysia and had never submitted itself to the jurisdiction of the Malaysian court.

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[33] The letter of credit which is the subject matter of the dispute was issued from the defendant's office in India. The discrepancies in the documents as well as the rejection of the documents were made by the defendant and the applicant, both located in India.

H **[34]** We also agree with the submission of learned counsel for the defendant that the defendant's obligation to reimburse the plaintiff for payment made to the beneficiary, arises from the terms of the letter of credit which was opened by the defendant in India.

[35] From the above, it would appear that witnesses as well as I documentary evidence in respect of the letter of credit would be located in India.

[36] It is well established by authorities that the proper law of the letter of credit was that with which it had, "the closest and most real connection".

(Refer to *Offshore International SA v. Banco Central SA and Another* [1976] 3 All ER 749; *Power Curber International Ltd v. National Bank of Kuwait SAK* [1981] 3 All ER 607.)

[37] Thus we agree with learned counsel for the defendant, that premised on all the facts and circumstances of the case as stated above, the *forum conveniens* is the High Court in Delhi India.